

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: February 20, 2013; Ruling No. 2013-3538; Agency: Virginia Department of Transportation; Outcome: Grievant Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

COMPLIANCE RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2013-3538
February 20, 2013

The Virginia Department of Transportation (“agency”) has requested a compliance ruling related to the grievant’s September 17, 2012 grievance. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding his grievance.

FACTS

On September 17, 2012, the grievant initiated a grievance with the agency. After proceeding through the management steps of the grievance procedure, on January 3, 2013, the agency head denied qualification of the September 17th grievance and notified the grievant via U.S. first-class mail and certified mail. The postal record reflects the certified mail notification was delivered the grievant’s residence on January 11, 2013. Having received no response from the grievant, on January 30, 2013, the agency mailed a letter of noncompliance to the grievant via U.S. first-class mail, certified mail, and e-mail. The agency requested a response from the grievant within five workdays upon receipt of the noncompliance letter. The postal record reflects the certified mail notification was left at the grievant’s residence on February 1, 2013.¹

Since more than five workdays have elapsed since the agency’s notification to the grievant of his alleged noncompliance, and the grievant has not yet advanced or concluded his grievance, the agency seeks a compliance ruling allowing it to administratively close the grievance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without

¹ While it appears that the grievant did not receive the certified mail, the mailing of correspondence, properly addressed and stamped, raises a presumption of receipt of the correspondence by the addressee. *E.g.*, *Washington v. Anderson*, 236 Va. 316, 322, 373 S.E.2d 712, 715 (1988). Accordingly, we must presume that the grievant received the agency’s notification by regular mail.

² *Grievance Procedure Manual* § 6.3.

EDR's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.³ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EDR, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EDR's order.⁴

In this case, the grievant appears to have failed to advance or conclude his grievance within five workdays of receiving the agency head's qualification decision, as required by the grievance procedure.⁵ Moreover, the agency notified the grievant of his noncompliance, but the grievant has not advanced or concluded his grievance.

As the grievant has apparently failed to advance or conclude his grievance in a timely manner, he has failed to comply with the grievance procedure. The Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management therefore orders the grievant to correct his noncompliance **within ten work days of the date of this ruling** by notifying his human resources office in writing that he wishes either to conclude the grievance or appeal the agency head's qualification decision. If he does not, the agency may administratively close the grievance without any further action on its part. The grievance may be reopened only upon a timely showing by the grievant of just cause for the delay (for example, a serious illness, or other circumstances beyond the grievant's control).

EDR's rulings on matters of compliance are final and nonappealable.⁶



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³ See *id.*

⁴ While in cases of substantial noncompliance with procedural rules the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party, EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, EDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

⁵ See *Grievance Procedure Manual* § 4.2.

⁶ See Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).